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COURT OF CRIMINAL APPEALS
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IN THE TEXAS COURT OF CRIMINAL APPEALS AT AUSTIN

FILED
COURT OF CRIMINAL APPEALS
8/11/2020
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NO. 14-17-00685-CR
IN THE COURT OF APPEALS FOR
THE FOURTEENTH DISTRICT OF
TEXAS
AT HOUSTON

TRIAL COURT NO. 1555099
IN THE 228th JUDICIAL
DISTRICT COURT OF HARRIS
COUNTY, TEXAS

NELSON GARCIA DIAZ, *APPELLANT*

V.

THE STATE OF TEXAS, *APPELLEE*

APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

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IDENTITY OF PARTIES AND COUNSEL

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PRESIDING JUDGE:	The Honorable Belinda Hill 228th District Court of Harris County Houston, Harris County, Texas 77002
APPELLATE COUNSEL:	Nicole DeBorde Hochglaube & DeBorde, P.C. 3515 Fannin Street Houston, Texas 77004

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to TEX. R. APP. PROC. 68.4(c), appellant does request oral argument.

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TO THE COURT OF CRIMINAL APPEALS:

STATEMENT OF THE CASE

At approximately 10:00pm on September 26, 2013, Troy Dupuy, an officer with the Houston Police Department, was at home and about to go to sleep when he heard two men breaking down his front door. (RR Vol. 6 at 30, 35). According to Dupuy, the men entered yelling "police" and Dupuy, skeptical about their status, went to confront them armed with his pistol. (RR Vol. 6 at 46-7). Upon determining the men were not police officers, Dupuy began shooting and one of the intruders returned fire, wounding Dupuy in the leg. (RR Vol. 6 at 53, 58). The men then hastily fled Dupuy's house after inadvertently dropping a pair of sunglasses and a battery and plastic backing from a cell phone. (RR Vol. 6 at 72, 73).

The incident drew intense media scrutiny and, within a few days, a Drug Enforcement Agency (DEA) confidential informant who had seen a report on TV told DEA agents that Appellant was involved in the incident. (RR Vol. 10 at 221). According to the informant, Appellant had intended to rob a drug dealer but went to the wrong house and ended up shooting a man inside. (RR Vol. 7 at 83-4).

As two DEA agents testified at Appellant's trial, they relayed their informant's information to the lead detective on the case, Harris County Sheriff's Office Deputy D.A. Angstadt. (RR Vol. 10 at 223-4). Angstadt, however, was initially skeptical of the DEA agents and only became interested when the agents described crime scene details not publicly known about the cell phone battery that had been left at the scene. (RR.

Vol. 2 at 19-20). After establishing the legitimacy of their informant's claims, the DEA agents and Angstadt discussed the informant's compensation. (RR Vol. 3 at 19). The DEA agents wanted their informant to be paid for his assistance but could not provide compensation for information pertaining to non-DEA investigations—like the Dupuy home invasion. (RR Vol. 3 at 19.) Angstadt also had no way to provide payment. (RR. Vol. 3 at 19). As a result, Angstadt suggested the DEA agents have their informant call Angstadt, routing the call through the Crimestoppers Organization in order to seek reward money. (RR. Vol. 3 at 19). Although "a little shocked" by the suggestion, the DEA agents agreed and had their informant call Crimestoppers. (RR Vol. 3 at 19). Apparently in order to maintain this prevarication, Angstadt consistently maintained—in the warrant affidavits and in his testimony at Appellant's trial—that the initial information inculpating Appellant came from an "anonymous" source. (DX 2; DX 3; RR Vol. 2 page 44). Further, Angstadt maintained that he had sought out the DEA's involvement, and not the other way around. (DX 2; DX 3; RR Vol. 2 page 44). According to Angstadt, it was simply a coincidence that the "anonymous" tipster was a confidential informant for the same DEA agents he happened to call for assistance with his investigation. (DX 2; DX 3; RR Vol. 2 page 44).

Despite these discrepancies, Angstadt agreed the DEA's assistance was useful, both in locating Appellant and in determining that Appellant had outstanding felony warrants from another state. (RR Vol. 8 at 133; RR Vol. 10 at 155). Based on the DEA's information, the Gulf Coast Task Force, a "multi-jurisdictional" law

enforcement agency, set up surveillance at an apartment complex in Harris County where Appellant was believed to be staying and officers watched as Appellant left the complex in the backseat of a vehicle. (RR Vol. 8 at 137, 140). The vehicle was monitored as it turned into a nearby grocery store parking lot. (RR Vol. 8 at 158). Authorities then descended on it, arrested Appellant, and detained the vehicle's other three occupants. (RR Vol. 8 at 164-5). Three cell phones were found on Appellant's person. (DX 2). Two other cell phones were found within the vehicle, and a computer and broken cell phone, missing its battery and backing, were found within the apartment Appellant had just left. (DX 3).

All of the above-described electronic devices were recovered at the time of Appellant's arrest on September 30, 2013. (DX 2 & DX 3). But authorities did not seek to search any of the devices until almost four years later. (DX 2 & DX 3). On June 16, 2017, police obtained two separate warrants, supported by affidavits with nearly identical verbiage, to search each of the above described electronic devices except, for reasons that are not clear in the record, the broken cell phone with the missing battery and backing. (DX 2 & DX 3). The first of the two warrants authorized the search of the three cell phones found on Appellant's person. (DX -2). The second warrant authorized the search of the other cell phones found in the vehicle where Appellant was arrested, as well as the computer recovered from the apartment Appellant had recently left. (DX 3). Consistent with Angstadt's testimony at

Appellant's trial, Angstadt's information in the warrant affidavit wrongly described the DEA informant as an "anonymous" source. (DX 2 & DX 3; RR Vol. 2 at 43).

The supporting affidavits for both warrants, Defendant's Exhibit 2 & 3, were signed by Harris County District Attorney Investigator T. Pham, who averred he had communicated with the investigating detective, D.A. Angstadt. (DX 2 & 3). The relevant portions of each affidavit read as follows:

> "On September 30, 2013, Dep. D.A. Angstadt received an anonymous tip that an individual known as 'Jessie' was involved in the home invasion against the Complainant. The tipster provided two phone numbers for the suspect. Based on Dep. D.A. Angstadt's training and experience as a narcotic, robbery and homicide investigator, Dep. D.A. Angstadt knew persons who commit home invasions are commonly involved in the illegal narcotics trade. Dep. D.A. Angstadt spoke with DEA Special Agent Michael Layne and requested SA Layne run the phone numbers through DEA databases. Dep. D.A. Angstadt learned that one of the phone numbers belonged to Defendant Nelson Garcia Diaz." (DX 2 page 2; DX 3 page 3).

The affidavit then requests authorization to search the electronic devices recovered at the time of Appellant's arrest for evidence that might relate to the Dupuy home invasion.

> "Your (sic[1]) Dep. D.A. Angstadt has found through training and experience and also through regular human experience that the majority of persons, especially those using cellular telephones, utilize electronic and wire communications almost daily. Therefore, it is Dep. D.A. Angstadt's opinion that stored communication probably exists within the seized cellular phones and computer, and the contents of these communications are probably relevant and material to the offenses committed. It is also the opinion of Dep. D.A. Angstadt that the contents of any identified stored communications, whether they are opened or unopened or listened to or un-listened to, are probably relevant and material to the investigation. Dep. D.A. Angstadt has also found through training and experience that individuals engaged in criminal activities utilize cellular telephones and other communication devices to communicate and share information regarding crimes they commit." (DX 2 page 3; DX 3 page 5).

[1] The affidavit tracks erroneous boilerplate language occasionally suggesting Deputy Angstadt—and not Investigator Pham— was the affiant.

On this basis, the Harris County District Attorney's Office Investigator sought to review every conceivable item within each of the described electronic devices.

> "It is Deputy D.A. Angstadt's belief, based on my (sic) investigation, that there is probable cause to believe that Defendant may have communicated with other individuals before, during or after the commission of these offenses using his cellular phone or computer. Dep. D.A. Angstadt believes these electronic devices could contain valuable information such as photographs/videos; text or multimedia messages (SMS and MMS); any call history or call logs; any emails, instant messaging or other forms of communication of which said phone is capable; Internet browsing history; any stored Global Positioning System (GPS) data; contact information including email addresses, physical addresses, mailing addresses, and phone numbers; any voicemail messages contained on said phone; any recordings contained on said phone; any social media posts or messaging, and any images associated thereto, including but not limited to that on Facebook, Twitter, and Instagram; any documents and/or evidence showing the identity of ownership and identity of the users of said described item(s); *computer files or fragments of files* (emphasis added); all tracking data and way points; CD-ROM's CD's, DVD's, thumb drives, SD cards, flash drives or any other equipment attached or embedded in the above described device that can be used to store electronic data, metadata and temporary files." (DX 2 page 3; DX 3 page 5).

The warrant Appellant challenges on appeal authorized the search of the three cell phones found on Appellant's person. (DX 2). Evidence from these three phones was admitted in the form of cell phone extracts and photographs in State's Exhibits 203, 204, 205 and 206. Appellant brings two questions for discretionary review, both based on the legitimacy of the affidavit used to establish probable cause for searching the three cell phones found on his person.

STATEMENT OF PROCEDURAL HISTORY

Appellant was charged with several different offenses emanating from the home invasion of a Houston Police Department officer on September 26, 2013. Appellant was initially arrested and charged with Felon in Possession of a Weapon on October 1, 2013 and an additional charge of Aggravated Robbery was filed on February 11, 2014. (DX 1, page 3; DX 2, page 3). Ultimately, the State tried Appellant for Burglary of a Habitation with Intent to Commit Aggravated Assault based on an indictment that was returned on June 13, 2017. (CR 6). Appellant pleaded not guilty before a jury but was found guilty as charged on August 14, 2017. (RR Vol. 11 at 75; CR 129). The same jury, after finding two enhancement paragraphs true, assessed punishment at 32 years confinement in the Texas Department of Criminal Justice. (CR 137). Appellant gave timely notice of his intent to appeal and the trial court's certification of Appellant's right of appeal certifies Appellant has the right to appeal. (CR 145, 147). Appellant's conviction was affirmed in a split decision by the Fourteenth Court of Appeals on July 16, 2020. *State of Texas v. Nelson Garcia Diaz,* 14-17-00685, July 16, 2020 (Tex. App.—Houston [14th Dist.]).

QUESTION FOR REVIEW NUMBER ONE:

"Does intentionally misidentifying an untested confidential informant as an "anonymous source" in a probable cause affidavit cause the informant's uncorroborated incriminating information to be excised pursuant to *Franks*?"

ARGUMENT

1. Statement of Facts

The trial court made findings of fact and conclusions of law after denying Appellant's motion to suppress. Among the findings of fact was that Deputy Angstadt, with reckless disregard for the truth, misidentified the source relied upon in the affidavit as being an "anonymous source" when, in fact, the source was a paid informant. (Trial Court Conclusions of Law #1.)

2. Applicable Law

Under *Franks v. Delaware,* evidence obtained pursuant to a warrant must be suppressed if 1) the defendant can establish by a preponderance of the evidence that the affidavit supporting the arrest contains a material misstatement that the affiant made with "reckless disregard for the truth" and 2) excising the false statement, the affidavit's remaining content is insufficient to establish probable cause. 438 U.S. 154, 155-6 (1978).

"Citizen informants are considered inherently reliable; confidential informants are not." *State v. Duarte,* 389 S.W.3d 349, 357 (Tex. Crim. App. 2012). Therefore, according to the dissent in this case, the misidentification of the source falsely increased

the source's appearance of credibility in the search warrant affidavit. *State of Texas v. Nelson Garcia Diaz,* 14-17-00685, July 16, 2020 (Tex. App.—Houston [14th Dist.]), (Spain, C., dissenting). Further, according to the dissent, the affidavit offers no indication that the actual paid informant had any sort of reliable track record or that corroborating evidence existed in support of the paid informant's claims. *Id.* Therefore, according to the dissent, *Franks* requires removal of all of the evidence in the affidavit that came from the uncorroborated claims of the paid informant. *Id.* Without inclusion of this information from the paid informant, the dissent found the affidavit in this case failed to establish probable cause for the search and all of the evidence obtained as a result of the search should have been suppressed. *Id.*

The majority, however, relies upon *Janecka,* for the proposition that misidentifying a known source as a unknown source solely to obscure the identity of the source for the source's protection is not the type of misrepresentation in a probable cause affidavit which offends the Fourth Amendment. *Janecka v. State* , 937 S.W.2d 456, 463 (Tex. Crim. App. 1996). The majority, therefore, upheld the trial court's denial of Appellant's motion to suppress and affirmed Appellant's conviction.

3. Argument

The question presented for discretionary review is whether *Janecka* applies to this situation. As the dissent points out, the misidentification in *Janecka* was fundamentally different than here. *State of Texas v. Nelson Garcia Diaz,* 14-17-00685, July 16, 2020 (Tex. App.—Houston [14th Dist.]), (Spain, C., dissenting). In *Janecka,* the affidavit misstated

that a known citizen informant was an unknown citizen informant. *Janecka v. State,* 937 S.W.2d 456, 463 (Tex. Crim. App. 1996). But the *Janecka* misstatement accurately described the source as a citizen and it did not falsely increase the credibility of the source. *Id.* Here, the misidentification of the source falsely added to the source's credibility by misidentifying a paid, confidential source as a (presumably unpaid) anonymous source. (RR Vol. 3 at 19). Further, the purpose of the deception in the *Janecka* affidavit was simply to protect the source's safety. In Appellant's case, the reason for misidentifying the source was to conceal the primary officer's fraud on the Crimestoppers Organization. (RR Vol. 3 at 19). Deputy Angstadt, who misrepresented the source's identity, knew that in order for the source to qualify for Crimestoppers compensation, the source had to pretend he was not a DEA informant. (RR Vol. 3 at 19). So Angstadt lied in his report to conceal this deception, and this lie ultimately made its way into the search warrant's affidavit. (DX 2, DX 3.)

The majority reasons that "the crucial information identifying appellant and appellant's involvement in the home invasion was essentially true and independently corroborated by Agents Layne and Thompson." Yet, as the dissenting opinion points out, "Later corroboration, however, does not cure deficiencies." *State of Texas v. Nelson Garcia Diaz,* 14-17-00685, July 16, 2020 (Tex. App.—Houston [14th Dist.]), (Spain, C., dissenting). The dissent counters this argument by citing *Whiteley*, which states , "An otherwise insufficient affidavit cannot be rehabilitated by testimony concerning

information possessed by the affiant when he sought the warrant but not disclosed to the issuing magistrate." *Whiteley v. Warden,* 401 U.S. 560, 565 n.8 (1971).

Given the fact that the Court of Appeals split on this issue and there are fundamental questions about whether *Janecka* should apply to this distinguishable set of facts, Appellant submits this question is a novel one which is appropriate for discretionary review under the Texas Rules of Appellate Procedure 66.3(e).

QUESTION FOR REVIEW NUMBER TWO:

> "Does the fact that an assailant left a part of his broken cell phone at the scene of a crime create a sufficient nexus to warrant searching all "files" and file "fragments" in all three cell phones recovered several days later from the defendant's person?

ARGUMENT

1. Statement of Facts

During the crime, the assailants got into a gunfight and were forced to flee the scene. In the chaos, one of them apparently dropped and broke his cell phone, leaving behind the phone's backing attached to its battery. (RR Vol. 6 at 72, 73). Several days after the crime, Appellant was arrested and found to be in possession of three cell phones. (DX 2.) The search warrant approved by the magistrate authorized the search of all "files" and "fragments" of files found within the three cell phones recovered from Appellant's person. (DX 2.)

2. Applicable Law

Probable cause does not exist to search unless there is "a sufficient nexus between (the) criminal activity (and)… the place to be searched." *Bonds v. State,* 403 S.W.3d 867, 873 (Tex. Crim. App. 2013). Regarding cell phone searches, a search warrant application must state facts and circumstances providing the applicant with probable cause to believe that searching the telephone or device is "likely to produce evidence in the investigation" of specific criminal activity described in the affidavit. Tex. Code Crim. Proc. Art. 18.0215(c)(5). In order to search a cell phone, the search warrant affidavit must usually include facts that a cell phone was used during the crime. *See Foreman v. State,* 561 S.W.3d 218, 237-8 (Tex. App.—Houston [14th Dist.] 2018, pet. granted).

3. Argument

The court of appeals cited several cases—mainly their own—for the proposition that the existence of cell phone usage during a crime warrants a search of a defendant's cell phone. *Foreman v. State,* 561 S.W. 3d 218, 237-8 (Tex. App.—Houston [14th Dist.] 2018, pet. granted.).; *Walker v. State,* 494 S.W.3d 905, 908-9 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd.); *Humaran v. State,* 478 S.W.3d 887, 893-4 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd.); *State v. Cantu,* 785 S.W.2d 181, 183 (Tex. App.—Houston [14th Dist.] 1990, pet. ref'd.); *Johnson v. State,* Nos. 11-17-00240-CR, 11-17-00241-CR, 2019 WL 4786152, at 4* (Tex. App.—Eastland Sept. 30, 2019) (mem. op., not designated for publication).

However, this Honorable Court has not spoken to the issue directly and this case tests the validity of such a proposition when stretched to its limit. In this case, the State sought to search every electronic device recovered at the time of Appellant's arrest—with the exception of the one device which was almost certainly present at the scene of the crime. (DX 2; DX 3.) A broken cell phone, missing its battery and backing and matching the battery and backing recovered from the scene, was recovered near the scene of Appellant's arrest. (DX 3.). But the State, for reasons that are not clear in the record, never sought to search it. Instead, the State sought to search all three phones found on Appellant's person, two other phones found in the vehicle he was in, and a computer that was located in the apartment he had recently left. (DX 2; DX 3.). The search of the cell phones found on his person ultimately resulted in meaningful evidence against him, while none of the other objects netted any evidence that was used in his trial. (SX 203-206.). The absence of evidence found on the other devices indicates how exhaustive, and for the most part fruitless, the State's requested search warrants proved to be.

Further, the authorized search within each device was all but unfettered, allowing the State to search any "fragment" of any "file" within any of the multiple devices that were recovered. (DX 2.). The singular nexus the Court of Appeals could identify in this case was that a part of a broken cell phone was recovered from the scene of the crime. *Diaz* page 12. This Honorable Court and the United States Supreme Court have both cautioned against overbroad, fishing expedition type searches that have little or no

connection to the specific crime under investigation. *See e.g. Riley v. California*, 134 S. Ct. 2473, 2494-5 (2014); *Long v. State*, 132 S.W.3d 443, 447 (Tex. Crim. App. 2004). Appellant asserts the State's search here lacked a sufficient nexus and is therefore appropriate for discretionary review under the Texas Rules of Appellate Procedure. Tex. R. App. Proc. 66.3(b)(c).

PRAYER FOR RELIEF

Wherefore, Appellant prays that this Honorable Court grant Appellant's petition for discretionary review under TEX. R. APP. PROC. 66.3(b)(c)(e); that this cause be set for submission to the Court of Criminal Appeals; and that, after submission, this Court reverse the judgment of the Court of Appeals and remand the case to the trial court for a new trial. TEX. R. APP. PROC. 78.1(d).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The word count of the countable portions of this computer-generated document specified by Rule of Appellate Procedure 9.4(i), as shown by the representation provided by the word-processing program that was used to create the document, is 3316 words. This document complies with the typeface requirements of rule 9.4(e), as it is printed in a conventional 14-point typeface with footnotes in 12-point typeface.

/s/ Nicole DeBorde

Nicole DeBorde

CERTIFICATE OF SERVICE

I hereby certify that a true copy of Appellant's petition for discretionary review was served via e-mail delivery through eFile.TXCourts.gov on August 6, 2020 to the following persons:

Kim Ogg
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Harris County District Attorney's Office 1201 Franklin
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State Prosecuting Attorney P.O. Box 12405
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/s/ *Nicole DeBorde*

Nicole DeBorde

APPENDIX

Opinion of July 16, 2020

Affirmed and Majority and Dissenting Opinions filed July 16, 2020.

In The

Fourteenth Court of Appeals

NO. 14-17-00685-CR

NELSON GARCIA DIAZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 228th District Court
Harris County, Texas
Trial Court Cause No. 1555099

M A J O R I T Y O P I N I O N

Appellant Nelson Garcia Diaz appeals his conviction for burglary of a habitation while committing the offense of aggravated assault with a deadly weapon. Appellant's sole challenge is to the trial court's denial of his motion to suppress evidence obtained from appellant's three cell phones. Because we conclude that the trial court did not err in denying the motion to suppress, we affirm the trial court's judgment.

Background

Troy Dupuy, a Houston Police Department officer, was at home with his wife around 10:00 p.m. when he heard a loud bang, which sounded like "somebody was trying to kick in the back door of the house." Dupuy retrieved a handgun and went to investigate. Dupuy heard voices on the front porch and then saw his front door flung open. When the door opened, Dupuy heard an individual on the front porch say "police police police." Dupuy testified that, based on his experience as a police officer, "it didn't really sound like something the way a policeman would probably do that when they breach a door," and he immediately thought that the individual on his front porch was not a police officer.

Two men entered Dupuy's house. One of the intruders wore a pair of sunglasses on the top of his head and carried a gun. Once Dupuy realized that the intruders were not law enforcement officials, he "immediately fired two rounds." The intruder with the gun fell to the floor while the other intruder ran back outside. The intruder on the floor exchanged several rounds of gunfire with Dupuy, and Dupuy was shot in the thigh. After the intruder escaped the house, police responded and recovered the back cover of a cell phone, a cell phone battery, and a pair of sunglasses, none of which belonged to Dupuy or his wife.

One of the intruders shared information about the incident with an acquaintance, who, coincidentally, served as a confidential informant for the federal Drug Enforcement Agency (DEA). A few days after the incident, the confidential informant contacted the DEA and provided Special Agent Robert Layne with a description of the suspect in the home invasion. The informant told Agent Layne that the suspect was known as "Jessie." Agent Layne shared this information with DEA Special Agent Ray Thompson, who in turn discovered that "Jessie" was in fact appellant. Agent Thompson confirmed appellant's identity by

contacting an agent involved in investigating appellant on other outstanding warrants. Agent Layne then provided appellant's name to the officer in charge of the home invasion investigation, Sergeant David Angstadt with the Harris County Sherriff's Office. Sergeant Angstadt corroborated information Agent Layne had received from the informant, specifically that the intruder had left behind a cell phone battery and battery cover.

Appellant had outstanding arrest warrants for armed robbery and kidnapping in Georgia, and the Gulf Coast Task Force, a multi-agency coalition, executed those warrants and arrested appellant in Houston. Once appellant was in custody, the Task Force contacted Sergeant Angstadt. Sergeant Angstadt took possession of effects obtained from a search of appellant's person and clothing, including three cell phones.[1] The State then charged appellant with the present offense, and a Harris County grand jury indicted appellant.[2]

Harris County District Attorney's Office Investigator Tuan Pham submitted an affidavit in support of a search warrant for the three cell phones. The affidavit stated that Sergeant Angstadt had received "an anonymous tip that an individual known as 'Jessie' was involved in the home invasion." The "tipster" provided two phone numbers for the suspect. The affidavit also asserted that, based on Sergeant Angstadt's training and experience, he "knew persons who commit home invasions are commonly involved in the illegal narcotics trade," so Sergeant Angstadt requested the DEA to run the phone numbers through its database. One of the phone numbers was registered to appellant. In reciting these facts in support of the

[1] Sergeant Angstadt also took possession of two other cell phones not at issue in this appeal.

[2] *See* Tex. Penal Code § 30.02(a)(3) ("A person commits an offense if, without the effective consent of the owner, the person . . . enters a building or habitation and commits or attempts to commit a felony, theft, or an assault.").

search warrant, and as the trial court found following a suppression hearing, the affidavit misrepresented the person who identified appellant as an anonymous source, when in fact the person who identified appellant was likely known by Sergeant Angstadt to have been the DEA confidential informant.

The magistrate issued the warrant, and law enforcement officials performed a forensic search of the cell phones. Prior to trial, appellant moved to suppress all evidence obtained as a result of the search, arguing that the magistrate could not have found probable cause when issuing the warrant. After a hearing, the trial court denied appellant's motion, and the State introduced several pieces of evidence obtained from the phones at the guilt-innocence phase of appellant's trial. According to appellant, the admitted evidence "included damaging information to the defense, including: 1) a photograph of Appellant holding a gun; 2) a photograph of Appellant holding a fictitious police badge; 3) call history confirming communications with the DEA informant's phone number; 4) a downloaded media report about Officer Dupuy's shooting; and 5) several texts from Appellant, subsequent to the incident, indicating that Appellant could not find his sunglasses."

The jury found appellant guilty as charged in the indictment, found two enhancement allegations for previous convictions true, and assessed punishment at thirty-two years' confinement. Appellant timely appealed.

Analysis

Appellant argues that the trial court erred in denying his motion to suppress evidence obtained from the three cell phones and offers three independent reasons why the court should have suppressed the evidence: (1) the affidavit and warrant failed to establish that the specifically described property or items to be searched constituted evidence of the offense or evidence that appellant committed the

offense; (2) the warrant impermissibly allowed a general search of the phones; and (3) the search warrant misrepresented the nature of the information leading the State to investigate appellant, including that Sergeant Angstadt incorrectly characterized the DEA confidential informant as an "anonymous" source, which the trial court found was made with reckless disregard for the truth.

1. Misidentification of Informant

We begin with appellant's challenge based on Sergeant Angstadt's representation of the confidential informant as an anonymous source. Appellant argues that the misrepresentation and other related assertions constitute a violation of *Franks v. Delaware*, 438 U.S. 154 (1978). Under *Franks*, an arrest warrant must be voided—and any evidence obtained pursuant to the arrest warrant suppressed—if (1) the defendant can establish by a preponderance of the evidence that the affidavit supporting the warrant contains a material misstatement that the affiant made knowingly, intentionally, or with reckless disregard for the truth, and (2) excising the false statement, the affidavit's remaining content is insufficient to establish probable cause. *Id.* at 155-56; *see also Janecka v. State*, 937 S.W.2d 456, 462 (Tex. Crim. App. 1996).

We review a trial court's ruling on a motion to suppress under a bifurcated standard of review. *Lerma v. State*, 543 S.W.3d 184, 189-90 (Tex. Crim. App. 2018). We review the trial court's factual findings for an abuse of discretion but review the trial court's application of the law to the facts de novo. *Id.* Our deferential review of the trial court's factual determinations also applies to the trial court's conclusions regarding mixed questions of law and fact that turn on credibility or demeanor. *State v. Ortiz*, 382 S.W.3d 367, 372 (Tex. Crim. App. 2012); *Valtierra v. State*, 310 S.W.3d 442, 447 (Tex. Crim. App. 2010). We review mixed questions of law and fact that do not turn on credibility and

demeanor, as well as purely legal questions, de novo. *State v. Woodard*, 341 S.W.3d 404, 410 (Tex. Crim. App. 2011).

The trial court is the sole trier of fact and judge of witness credibility and the weight to be given their testimony. *Valtierra*, 310 S.W.3d at 447. When the trial court makes explicit findings of fact, as here, we determine whether the evidence, when viewed in the light most favorable to the trial court's ruling, supports the fact findings. *State v. Kelly*, 204 S.W.3d 808, 818 (Tex. Crim. App. 2006). We afford the prevailing party the strongest legitimate view of the evidence and all reasonable inferences that may be drawn from that evidence. *State v. Duran*, 396 S.W.3d 563, 571 (Tex. Crim. App. 2013). We will uphold the trial court's ruling if it is reasonably supported by the record and is correct on any theory of law applicable to the case. *State v. Story*, 445 S.W.3d 729, 732 (Tex. Crim. App. 2014).

Agent Thompson, Agent Layne, and Sergeant Angstadt testified at the suppression hearing. The court found Agent Layne's testimony and Agent Thompson's testimony credible and found Sergeant Angstadt's testimony credible at times and not credible at other times. The trial court made the following relevant findings:

> 10. . . . The confidential informant provided SA Layne with a description of the suspect in the aggravated assault and told him the suspect was known as "Jessie." The confidential informant also provided SA Layne with two telephone numbers for the suspect. . . .
>
> 14. SA Thompson ran the telephone numbers provided for the suspect given to SA Layne by the confidential informant (CI-01) through DEA databases. SA Thompson learned those numbers were connected to a case in Georgia in which the suspect was listed as "Jessie" Last Name Unknown (LNU). After learning this information, SA Thompson made contact with SA Chris Mueller in Georgia.

15. SA Mueller provided SA Thompson with information identifying "Jessie LNU" as the defendant, Nelson Garcia Diaz. SA Thompson confirmed that the phone numbers provided by the confidential informant belonged to the defendant, Nelson Garcia Diaz. Not only did SA Mueller provide SA Thompson with "Jessie's" true name, he also advised SA Thompson that Nelson Garcia Diaz had outstanding warrants. . . .

18. After SA Layne debriefed the confidential informant, he spoke with Sgt. Angstadt by telephone and confirmed Sgt. Angstadt was working the aggravated assault case. SA Layne told Sgt. Angstadt he was working with a confidential informant who provided him with information on the case, including identifying the suspect as "Jessie", and providing telephone numbers associated with the suspect. During the same telephone conversation, SA Layne told Sgt. Angstadt the confidential informant met with the suspect and learned that the suspect had apparently dropped a cell phone battery and a cell phone battery cover at the scene of the aggravated assault. . . . During SA Layne's telephone conversation with Sgt. Angstadt, Sgt. Angstadt confirmed that a battery and battery cover were in fact left at the scene of the aggravated assault. SA Layne further advised Sgt. Angstadt that DEA had confirmed the telephone numbers provided by the confidential informant belonged to the defendant, Nelson Garcia Diaz, and that Mr. Garcia Diaz had active warrants.

19. Since the DEA could not pay the confidential informant for the information he provided, SA Layne attempted to find out whether the Harris County Sheriff's Office could pay the confidential informant for providing information on the aggravated assault case to DEA. Sgt. Angstadt advised SA Layne that the homicide division did not have funds to pay the confidential informant.

20. SA Layne was concerned about keeping the identity of the informant confidential. He was very concerned about the safety of the confidential informant since the investigation was focused on violent cartel members.

21. Sgt. Angstadt recommended to SA Layne the confidential informant could get paid by calling crime stoppers as an anonymous tipster and reporting his information.

22. Because SA Layne was upset that the county never paid the confidential informant, the inference from SA Layne's testimony is

> credible that the confidential informant followed Sgt. Angstadt's recommendation and reported his information concerning the aggravated assault case as an anonymous tipster through crime stoppers.
>
> 23. The court finds that in an effort to get paid the DEA confidential informant also reported his information concerning the aggravated assault "anonymously" and he is also the anonymous tipster referenced in the search warrant affidavits. . . .
>
> 25. The information the confidential informant provided to SA Layne and included in the cell phone search warrant[] . . . was confirmed and found to be true by SA Layne or SA Thompson. . . .
>
> 32. The Court finds Sgt. Angstadt's characterization of the DEA confidential informant as an anonymous tipster was incomplete and not completely accurate.

In its conclusions of law, the court noted that "the manner in which an officer receives information from a confidential informant is not material as it pertains to probable cause," so long as the information was essentially true. For this reason, the court concluded that Sergeant Angstadt's failure to identify the anonymous source as a confidential informant was not a *Franks* violation, relying on the Court of Criminal Appeals' decision in *Janecka*. *See Janecka*, 937 S.W.2d at 463 ("As we understand *Franks*, a fabrication intended solely to obscure the identity of an informant for his or her protection is not the type of misrepresentation which offends the Fourth Amendment.").

Agent Layne explained why the confidential informant reported the information anonymously—i.e., to receive compensation otherwise unavailable. The trial court found Agent Layne's testimony credible, and we defer to that determination. Moreover, whether attributed to a confidential informant or to an anonymous source, the crucial information identifying appellant and appellant's involvement in the home invasion was essentially true and independently corroborated by Agents Layne and Thompson. The record therefore supports the

conclusion that Sergeant Angstadt's misidentification was not material to the magistrate's probable cause finding. *See id.* ("Deferring to the trial court's acceptance of Bonds' explanation that the purpose of the misrepresentation was not to deceive the trial court, and noting that the crucial information was in fact true, we think that this is not a misrepresentation of the type contemplated in *Franks*.").

The crux of the parties' arguments during the suppression hearing was the misidentification of the confidential informant, but appellant further argued in his motion to suppress that "S.A. [Layne] did not run 'phone numbers' through any databases to connect Mr. Garcia to the offense." Appellant similarly argues in this court that the affidavit misrepresented the nature of the DEA's involvement in the investigation—i.e., the affidavit stated that Sergeant Angstadt initially reached out to the DEA when in fact the trial court found that the DEA initially reached out to Sergeant Angstadt as a result of information received from the confidential informant. The trial court did not specifically address this part of appellant's argument in its findings and conclusions, but we determine that the record supports the implied conclusion that the affidavit's misrepresentation of the DEA's initial involvement was not material to the probable cause finding. As noted above, the crucial information identifying appellant and appellant's involvement in the home invasion was essentially true and independently corroborated.

We agree with the trial court that appellant has not shown a *Franks* violation on these facts.

2. Connection of Phones to Offense

Appellant challenges the magistrate's probable cause finding because the affidavit failed to establish a nexus between the cell phones and the offense.

When reviewing a magistrate's decision to issue a warrant, appellate courts apply a highly deferential standard of review because of the constitutional preference for searches conducted pursuant to a warrant over warrantless searches. *State v. McLain*, 337 S.W.3d 268, 271-72 (Tex. Crim. App. 2011). When ruling on a motion to suppress evidence obtained pursuant to a search warrant, a trial court is limited to the four corners of the warrant and affidavit supporting the warrant. *Id.* at 271. The affidavit is interpreted in a non-technical, commonsense manner drawing reasonable inferences solely from the facts and circumstances contained within the four corners of the affidavit. *See State v. Elrod*, 538 S.W.3d 551, 554 (Tex. Crim. App. 2017); *Bonds v. State*, 403 S.W.3d 867, 873 (Tex. Crim. App. 2013). "When in doubt, we defer to all reasonable inferences that the magistrate could have made" that are supported by the record. *Bonds*, 403 S.W.3d at 873; *see also Barrett v. State*, 367 S.W.3d 919, 922 (Tex. App.—Amarillo 2012, no pet.) (citing *Rodriguez v. State*, 232 S.W.3d 55, 61 (Tex. Crim. App. 2007)). Probable cause is a "flexible and non-demanding standard," *Bonds*, 403 S.W.3d at 873, and "[a]s long as the magistrate had a substantial basis for concluding that probable cause existed, we will uphold the magistrate's probable cause determination." *McLain*, 337 S.W.3d at 271.

The Fourth Amendment mandates that "no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *See* U.S. Const. amend. IV. "Probable cause exists when, under the totality of the circumstances, there is a fair probability or substantial chance that contraband or evidence of a crime will be found at the specified location." *Bonds*, 403 S.W.3d at 873. In other words, there must be "a sufficient nexus between criminal activity, the things to be seized, and the place to be searched." *Id.* As applicable to a cell phone search

warrant, the application must state the facts and circumstances providing the applicant with probable cause to believe that searching the telephone or device is "likely to produce evidence in the investigation" of specific criminal activity described in the affidavit. Tex. Code Crim. Proc. art. 18.0215(c)(5). Further, this court has stated that an affidavit offered in support of a warrant to search the contents of a cell phone must usually include facts that a cell phone was used during the crime or shortly before or after. *See Foreman v. State*, 561 S.W.3d 218, 237-38 (Tex. App.—Houston [14th Dist.] 2018, pet. granted) (en banc) (citing *Walker v. State*, 494 S.W.3d 905, 908-09 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd); *Humaran v. State*, 478 S.W.3d 887, 893-94 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd)).

Here, appellant argues that nothing, "other than the officer's generalized assumptions" that criminals utilize cellular telephones to communicate and share information regarding crimes they commit, connected the specified offense with the phones to be searched. We disagree because, excluding any reliance on Sergeant Angstadt's assertion that generally criminals use cellular telephones and other electronic devices to facilitate criminal activity, other facts in the affidavit establish a sufficient nexus between the cell phones and the alleged offense. The affidavit stated that two men were involved in the home invasion and that police recovered several parts of one or more cell phones at the scene. From this, the magistrate reasonably could infer that the perpetrators possessed or utilized one or more cell phones before or during the planning or commission of the offense and that any recovered cell phones could have evidence of the offense.[3] For instance,

[3] According to appellant, police searched his apartment subsequent to his arrest and found a cell phone missing its battery and back cover, but that particular cell phone was not a subject of the challenged search warrant. Appellant suggests that probable cause may exist for the specific cell phone that was missing the battery and plastic backing police recovered from the scene, but there was no probable cause to search the three cell phones police took from appellant's

the magistrate reasonably could infer that the intruders' scheme of pretending to be police officers necessitated planning, which could have been orchestrated by telephonic communication. The affidavit also stated that DNA testing could not exclude appellant as a source of DNA on the sunglasses left at the scene, thus directly tying appellant to the crime scene. From this, the magistrate reasonably could infer that appellant was the owner of both the sunglasses and the cell phone or phones from which pieces detached during the offense and were left at the scene. Further, the affidavit provided that appellant was associated with at least two phone numbers and that police recovered a total of five cell phones in appellant's immediate possession or control upon his arrest. The magistrate reasonably could infer that appellant utilized these phones interchangeably and that evidence of criminal activity on one phone could have been transferred to another.

Interpreting the affidavit in a common sense and realistic manner and recognizing that the magistrate may draw reasonable inferences, we hold that the affidavit supports a probable cause finding that searching the cell phones was likely to produce evidence in the investigation of the criminal activity described in the application. Tex. Code Crim. Proc. art. 18.0215(c)(5). In so holding, we do not rely on Sergeant Angstadt's assertions that "the majority of persons, especially those using cellular telephones, utilize electronic and wire communications almost

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possession upon arrest because they could not be connected to the home invasion. We disagree. The fact that the intruder had one or more cell phones before, during, and after the commission of the offense is a sufficient basis from which the magistrate could conclude that a fair probability existed that evidence of criminal activity would be found on a cell phone in appellant's possession; the magistrate did not have to be certain of the specific cell phone. *State v. Cantu*, 785 S.W.2d 181, 183 (Tex. App.—Houston [14th Dist.] 1990, pet. ref'd) ("The probable cause standard is not technical, it is practical, and deals with *probabilities*, not hard certainties.") (emphasis in original); *accord also Johnson v. State*, Nos. 11-17-00240-CR, 11-17-00241-CR, 2019 WL 4786152, at *4 (Tex. App.—Eastland Sept. 30, 2019, no pet.) (mem. op., not designated for publication) ("in an increasingly technology-dependent society," magistrate could infer that records or communications of criminal activity would be on appellant's cell phone).

daily" or that "individuals engaged in criminal activities utilize cellular telephones and other communication devices to communicate and share information regarding crimes they commit." Excluding those statements, the facts contained in the affidavit and reasonable inferences therefrom as described above provided a sufficient basis from which the magistrate reasonably could conclude that a "fair probability or substantial chance" existed that evidence of the home invasion would be found on appellant's cell phones. *Bonds*, 403 S.W.3d at 873. Further, consistent with our holding in *Foreman*, the facts show or support a reasonable inference that a cell phone or phones were "used during the crime or shortly before or after." *Foreman*, 561 S.W.3d at 237.

3. General Search

Finally, appellant argues that the search warrant affidavit impermissibly "sought a sweeping, unrestricted search . . . in the speculative hope that some evidence, somewhere . . . might be found."

Under the Fourth Amendment, law enforcement may not embark on "a general, evidence-gathering search, especially of a cell phone which contains much more personal information . . . than could ever fit in a wallet, address book, briefcase, or any of the other traditional containers" for the storage of personal information. *State v. Granville*, 423 S.W.3d 399, 412 (Tex. Crim. App. 2014) (internal quotation omitted); *see also Butler v. State*, 459 S.W.3d 595, 601 n.3 (Tex. Crim. App. 2015) (acknowledging that both United States Supreme Court and Texas Court of Criminal Appeals have recognized that cell phone users have reasonable expectation of privacy in content of their cell phones). A warrant was required in this instance, *see Granville*, 423 S.W.3d at 417, and law enforcement obtained one. To comply with the Fourth Amendment, a search warrant must describe the things to be seized with sufficient particularity to avoid the possibility

of a general search. *Thacker v. State*, 889 S.W.2d 380, 389 (Tex. App.—Houston [14th Dist.] 1994, pet. ref'd). The Fourth Amendment's particularity requirement prevents general searches, while at the same time assuring the individual whose property is being seized and searched of both the lawful authority and limits of the search itself. *Groh v. Ramirez*, 540 U.S. 551, 561 (2004). "The constitutional objectives of requiring a 'particular' description of the place to be searched include: 1) ensuring that the officer searches the right place; 2) confirming that probable cause is, in fact, established for the place described in the warrant; 3) limiting the officer's discretion and narrowing the scope of his search; 4) minimizing the danger of mistakenly searching the person or property of an innocent bystander or property owner; and 5) informing the owner of the officer's authority to search that specific location." *Long v. State*, 132 S.W.3d 443, 447 (Tex. Crim. App. 2004).

The particularity requirement may be satisfied by cross-referencing a supporting affidavit that describes the items to be seized, even though the search warrant contains no such description. *See United States v. Richards*, 659 F.3d 527, 537 (6th Cir. 2011); *see also United States v. Triplett*, 684 F.3d 500, 505 (5th Cir. 2012) (noting that law permits affidavit incorporated by reference to amplify Fourth Amendment particularity requirement). However, "the requirements for the particularity of the description of an item may vary according to the nature of the thing being seized." *Thacker*, 889 S.W.2d at 389.

Regarding computers and other electronic devices, such as cell phones, case law requires that warrants affirmatively limit the search to evidence of specific crimes or specific types of materials. *Farek v. State*, No. 01-18-00385-CR, 2019 WL 2588106, at *8 (Tex. App.—Houston [1st Dist.] June 25, 2019, pet. ref'd) (mem. op., not designated for publication) (citing *United States v. Burgess*, 576

F.3d 1078, 1091 (10th Cir. 2009)). If a warrant permits a search of "all computer records" without description or limitation, it will not meet Fourth Amendment particularity requirements. *Id.* However, a search of computer records that is limited to those related to the offense set forth in the affidavit is appropriately limited. *Id.*

Here, the warrant permitted the cell phones to be searched for:

- photographs/videos;
- texts or multimedia messages (SMS or MMS);
- any call history or call logs;
- any e-mails, instant messaging, or other forms of communication of which said phone is capable;
- Internet browsing history;
- any stored Global Positioning System (GPS) data;
- contact information including e-mail addresses, physical addresses, mailing addresses, and phone numbers;
- any voicemail messages contained on said phone;
- any recordings contained on said phone;
- any social media posts or messaging, and any images associated thereto, including but not limited to that on Facebook, Twitter, and Instagram;
- any documents and/or evidence showing the identity of ownership and identity of the users of said described item(s);
- computer files or fragments of files;
- all tracking data and way points; and
- CD-ROM's, CD's, DVD's, thumb drives, SD Cards, flash drives or any other equipment attached or embedded in the above described device that can be used to store electronic data, metadata, and temporary files.

Although the general object of the warrant—a "forensic analysis" of specific categories of electronic data stored on appellant's cell phones—"tacitly encompasses electronic data that might, upon a thorough forensic examination, be identified as being non-offense related," we do not construe the warrant and the accompanying affidavit as "allow[ing] an unfettered and unlimited search" of appellant's cell phones. *Roberts v. State*, Nos. 07-16-00165-CR, 07-16-00166-CR, 2018 WL 1247590, at *6 (Tex. App.—Amarillo Mar. 9, 2018, pet. ref'd) (mem. op., not designated for publication). Rather, the warrant authorized a search of cell phone data related to the offense set forth in the attached probable cause affidavit. *See Farek*, 2019 WL 2588106, at *8 (holding that warrant did not authorize overbroad, general search because supporting affidavit sufficiently linked the data to be searched to the described offense); *Roberts*, 2018 WL 1247590, at *6 (same). As discussed above, the required nexus between the facts and circumstances of the investigation and the items to be searched was unquestionably present. Police recovered pieces of one or more cell phones at the scene; the intruders coordinated the invasion posing as police officers, which required planning; and appellant was associated with multiple phone numbers. Thus, Sergeant Angstadt had reason to believe that evidence relating to the investigation would be found on one or more cell phones used or possessed by the suspect. *Cf. United States v. Oglesby*, No. 4:18-CR-0626, 2019 WL 1877228, at *1 (S.D. Tex. Apr. 26, 2019) (finding warrant fatally overbroad when conduct described in the affidavit did not "inherently implicate" the use of a cell phone).

Appellant nonetheless focuses on the warrant's authorization of a search for, *inter alia*, "computer files or fragments of files" and contends that this phrase establishes that the warrant was fatally overbroad. We disagree. The supporting affidavit made clear that the search was for evidence "relevant and material to the

investigation," and the affidavit and warrant listed specific types of data that likely contained relevant evidence. Any ambiguity or potential overbreadth in the phrase "computer files or fragments of files" was cured by the limitation on the search to evidence of specific crimes or specific types of materials. *Farek*, 2019 WL 2588106, at *8; *Burgess*, 576 F.3d 1078, 1091. "Indeed, the type of evidence seized from appellant's phone and introduced against him at trial—pictures and [communications] relating to the offense set forth in the affidavit—was . . . specifically listed in the affidavit" and the warrant. *Farek*, 2019 WL 2588106, at *10. Because the warrant and supporting affidavit directly link the evidence being sought to the offense being investigated at the time the warrant was obtained, the search was not an overbroad general search. *See id.* (rejecting appellant's claim that warrant authorizing search of phone for "any and all other digital data" and "any and all deleted digital data" was overbroad).

For these reasons, we hold that the trial court did not err in denying appellant's motion to suppress, and we overrule appellant's issue.

Conclusion

We affirm the trial court's judgment.

/s/ Kevin Jewell
Justice

Panel consists of Justices Christopher, Jewell, and Spain (Spain, J., dissenting).
Publish — Tex. R. App. P. 47.2(b).

Affirmed and Majority and Dissenting Opinions filed July 16, 2020.

In the

Fourteenth Court of Appeals

NO. 14-17-00685-CR

NELSON GARCIA DIAZ, Appellant

v.

THE STATE OF TEXAS, Appellee

On Appeal from the 228th District Court
Harris County, Texas
Trial Court Cause No. 1555099

DISSENTING OPINION

"Citizen informants are considered inherently reliable; confidential informants are not." *State v. Duarte*, 389 S.W.3d 349, 357 (Tex. Crim. App. 2012). Yet the majority fails to properly address this distinction, and in so doing misapplies *Franks v. Delaware*. 438 U.S. 154, 155–56 (1978).

I respectfully dissent.

In *Duarte*, the Court of Criminal Appeals succinctly explained, "The

citizen-informer is presumed to speak with the voice of honesty and accuracy. The criminal snitch who is making a quid pro quo trade does not enjoy any such presumption; his motive is entirely self-serving." 389 S.W.3d at 356. Accordingly, there must be corroborating evidence of a paid confidential informant's credibility. *See id.* at 357–58. Confidential informants "may be considered reliable tipsters if they have a successful 'track record.'" *Id.* at 357. However, "tips from anonymous or first-time confidential informants of unknown reliability must be coupled with facts from which an inference may be drawn that the informant is credible or that his information is reliable." *Id.* at 358.

The affidavit supporting the search warrant states that Angstadt had received "an anonymous tip that an individual known as 'Jessie' was involved in the home invasion." "Jessie" was identified as appellant, and the affidavit containing this "tip" resulted in a search warrant for appellant's phones, leading to the discovery of evidence connecting him with the crime for which he was ultimately convicted.

The problem here is that the "anonymous tip" actually came from a paid Drug Enforcement Agency informant. The trial court's unchallenged findings reflect that "SA Layne told Sgt. Angstadt he was working with a confidential informant who provided him with information on the case, including identifying the suspect as 'Jessie', and providing telephone numbers associated with the suspect." The trial court further found Angstadt's "characterization of the DEA confidential informant as an anonymous tipster was incomplete and not completely accurate."

I agree with the trial court that this evidence shows that Angstadt exhibited, at minimum, a "reckless disregard for the truth" as required by the first prong of

Franks.[1] 438 U.S. at 155–56. I would hold, however, that the misrepresentation is also material, given the differences in the presumptions applied to evidence received from a citizen informant versus a confidential informant, and the lack of requisite corroboration in the affidavit. *See Duarte*, 389 S.W.3d at 356–58.

The second prong of *Franks* requires us to excise the false statement. *See* 438 U.S. at 156. The relevant language from the affidavit states Angstadt had received "an anonymous tip that an individual known as 'Jessie' was involved in the home invasion." Based on the trial court's unappealed findings, the relevant falsity is "anonymous tip"; even when we only remove the word "anonymous" from the affidavit, we are left with "a[ ] tip that an individual known as 'Jessie' was involved in the home invasion." This allegation, however, is insufficient as a matter of law because there is neither corroboration nor information that the confidential informant had a successful "track record." *See Duarte*, 389 S.W.3d at 357. The absence of probable cause after excising the statement satisfies the second prong of *Franks*.

The majority cites *Janecka v. State* for the proposition that "a fabrication intended solely to obscure the identity of an informant for his or her protection is not the type of misrepresentation which offends the Fourth Amendment," and concluding that the misrepresentation here falls outside the scope of *Franks*. 937 S.W.2d 456, 463 (Tex. Crim. App. 1996). *Janecka*, however, is inapposite, as it involved characterizing a citizen as a confidential informant, not misrepresenting a paid informant as merely an anonymous source. *See id.* at 463–64. The majority further determines that any misrepresentation was not material, as "the crucial

[1] Under *Franks*, evidence obtained pursuant to an arrest warrant must be suppressed if (1) the defendant can establish by a preponderance of the evidence that the affidavit supporting the warrant contains a material misstatement that the affiant made knowingly, intentionally, or with reckless disregard for the truth, and (2) excising the false statement, the affidavit's remaining content is insufficient to establish probable cause. *See* 438 U.S. at 155–56.

information identifying appellant and appellant's involvement in the home invasion was essentially true and independently corroborated by Agents Layne and Thompson." Later corroboration, however, does not cure deficiencies in the original affidavit. *See Whiteley v. Warden*, 401 U.S. 560, 565 n.8 (1971) ("[A]n otherwise insufficient affidavit cannot be rehabilitated by testimony concerning information possessed by the affiant when he sought the warrant but not disclosed to the issuing magistrate.").

I conclude that the evidence discovered via the warrant was required to be suppressed under *Franks*. I would further hold that failure to suppress this evidence was not harmless, and accordingly, I respectfully dissent.

/s/ Charles A. Spain
Justice

Panel consists of Justices Christopher, Jewell, and Spain (Jewell, J., majority).
Publish — TEX. R. APP. P. 47.2(b).

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